BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

FRANCISCO MAGALLANES	)	
Claimant	)	
VS.	)	
	)	Docket No. 159,193
PATRICK WELL SERVICE	)	
Respondent	)	
AND	)	
	)	
U. S. F. & G.	)	
Insurance Carrier	)	

ORDER

On January 28, 1998, the application of respondent for review by the Workers Compensation Appeals Board of an Award by Special Administrative Law Judge William F. Morrissey, dated July 25, 1997, came on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, Joseph Seiwert of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Kerry McQueen of Liberal, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

(1) What was the average weekly wage of claimant on the date of accident?

(2) What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board makes the following findings of fact and conclusions of law:

Findings of Fact

(1) Claimant suffered an injury to his low back while working for respondent on March 6, 1991. Claimant began his employment with respondent on February 16, 1991.

(2) Claimant saw Dr. Vernon vanBolden II, in Texas, who diagnosed a pinched nerve. Claimant received substantial treatment with several doctors and ultimately came under the care of Dr. Pedro A. Murati. Dr. Murati examined claimant beginning August 1994. At that time claimant had already undergone a two-level fusion at L3-4 and L4-5 with resulting myofacial pain syndrome, radiculopathy at the S1 level on the left side, and chronic musculoskeletal strain with bilateral piriformis syndrome which is a syndrome where the muscle stretches from the hip to the lower sacrum and produces intense pain.

(3) In Dr. Murati's opinion, claimant was provided the wrong kind of treatment for the injury suffered and the surgery performed in Texas was unnecessary. Dr. Murati opined claimant had suffered a 29 percent whole body functional impairment as a result of the injury and resulting surgery and placed specific restrictions on claimant including restricting claimant to sedentary work and opining that he should occasionally sit, bend, climb stairs, climb ladders, and crawl; frequently stand and walk; and should alternate sitting and standing as often as needed and change positions as often as needed.

(4) Claimant was examined by two vocational experts regarding his loss of access to the open labor market and loss of ability to earn comparable wages. Mr. James Molski, after reviewing the medical reports and restrictions of Dr. Murati, found claimant had lost 80 to 85 percent of his ability to perform work in the open labor market. After reviewing the medical reports of Dr. C. Reiff Brown, he opined claimant would have a 60 to 65 percent loss of access to the open labor market. It was stipulated that Ms. Karen Crist Terrill would testify on behalf of the respondent, after reviewing Dr. Brown's restrictions, that claimant had lost 36 percent of his ability to perform work in the open labor market. Both Mr. Molski and Ms. Terrill felt claimant was capable of earning $5.50 to $6.50 per hour post-injury.

(5) The Special Administrative Law Judge averaged the opinions of Mr. Molski and Ms. Terrill regarding claimant's ability to perform work in the open labor market and assessed claimant a 60 percent loss of ability.

(6) The Special Administrative Law Judge calculated claimant's average weekly wage at $508.48 and, when considering the opinions of Mr. Molski and Ms. Terrill regarding claimant's ability to earn wages, found claimant to have suffered a 53 percent loss of ability to earn comparable wages. In comparing both the 60 percent loss of ability to perform work in the open labor market and the 53 percent loss of ability to earn comparable wages, the Special Administrative Law Judge awarded claimant a 56 percent permanent partial general body disability.

Conclusions of Law

The Appeals Board will first consider the average weekly wage of claimant on the date of injury.

Claimant earned $7.50 per hour as a full-time employee for respondent prior to the accident. This equates to $300 per week straight time pay. In addition, claimant earned overtime income of $722.25. The 19 days which claimant worked for respondent represents 2.71 weeks total employment through the date of accident. Dividing $722.25 by 2.71 gives an average overtime of $266.51 per week. While claimant argues he customarily worked 10 to 15 hours per day, the amount of hours actually worked by claimant during the 19 days during which he was employed by respondent does not support this allegation. The Appeals Board finds the overtime pay listed in the record when combined with claimant's hourly rate of $7.50 per hour as a full-time employee computes to an average weekly wage of $566.51.

With regard to the nature and extent of injury and/or disability, the Appeals Board must consider first respondent's contention that claimant has violated the principles set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foulk, the Kansas Court of Appeals held that the Workers Compensation Act in Kansas should not be construed to award benefits to a worker solely for refusing a proffered job that the worker has the ability to perform. In this instance, a letter, dated January 7, 1994, was provided from respondent to claimant's attorney. In that letter, respondent made the following offer:

> We currently do not have any work that would be considered light duty. We would, however, make some type of work available for Mr. Magallanes so that he would be able to return to work.

While this offer was provided to claimant's attorney, the evidence in the record indicates claimant was not made aware of the offer. The Appeals Board, in considering the language of the January 7 letter, further finds that the ambiguities contained in this letter do not satisfy the obligations and requirements set forth in Foulk. An offer made by respondent must be specific and unambiguous. The offer by respondent to provide "some type of work" leaves a multitude of questions unanswered regarding the specific job, the specific physical requirements of the job, whether this job will meet the restrictions placed

upon claimant by the treating physician, whether this is a full-time, part-time, or temporary job, and the compensation to be provided to claimant for this job. The Appeals Board, therefore, finds that even if claimant were aware of this offer, he would not violate the principles of Foulk in refusing to accept this ambiguous job offer of respondent.

In addition, at oral argument the respondent argued that claimant violated the policies set forth in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997) in that claimant failed to make a good faith effort to obtain post-injury employment. In Copeland, the Court of Appeals held that if a claimant, post-injury, does not put forth a good faith effort to obtain employment, then the trier of fact is obligated to impute a wage based upon the evidence in the record as to claimant's wage earning ability. The Appeals Board does not apply Copeland to the pre-July 1, 1993, version of K.S.A. 44-510e as a claimant's ability to earn wages is already a part of the work disability formula. Copeland becomes significant when considering the wage earning portion of K.S.A. 44-510e.

However, claimant's post-injury job history is significant under K.S.A. 1990 Supp. 44-510e as it provides evidence of claimant's ability to earn wages. Claimant obtained several jobs after leaving respondent including working in a cotton gin, picking peppers, pulling sugar beets in Colorado, and working as a waiter which was a job claimant continued to hold at the time of the regular hearing. Claimant did not feel that these jobs, though physical, violated the restrictions placed upon him by Dr. Brown and Dr. Murati. While working for the cotton gin, claimant testified having worked up to 84 hours per week at $4.50 per hour resulting in an average weekly wage of $477. As a waiter claimant typically earns $4.25 per hour as a full-time, 40-hour-per-week employee. This equates to a weekly regular rate of $170 per week. In addition, claimant testified to earning between $200 and $300 per week on the average in tips.

While both Mr. Molski and Ms. Terrill gave opinions regarding claimant's earning abilities, the Appeals Board finds that the actual earnings by claimant display a higher earning potential than either vocational expert opined. The Appeals Board finds claimant capable of earning $470 per week as displayed by the cotton gin and the restaurant jobs. The Appeals Board, therefore, finds claimant has suffered a 17 percent loss of ability to earn a comparable wage when compared to his pre-injury average weekly wage of $566.51.

K.S.A. 1990 Supp. 44-510e(a) in effect as of March 1991 states:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment.

The Kansas Supreme Court, in Hughes v. Inland Container Corp., 247 Kan. 407, 799 P.2d 1011 (1990), stated that the statute was silent as to how the reduction in claimant's ability to perform work in the open labor market and to earn comparable wages was to be considered. In Hughes, the Court considered a balancing of the two factors, while not required, was acceptable as a method of computing the work disability under K.S.A. 1990 Supp. 44-510e. The Appeals Board, in considering Hughes, averages claimant's 60 percent loss of ability to perform work in the open labor market with the 17 percent loss of ability to earn comparable wages and finds that claimant has suffered a 38.5 percent permanent partial disability to the body as a whole as a result of the injuries suffered on March 6, 1991.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Special Administrative Law Judge William F. Morrissey, dated July 25, 1997, should be, and is hereby, modified and claimant, Francisco Magallanes, is granted an award against respondent, Patrick Well Service, and its insurance carrier, U. S. F. & G., for an injury suffered on March 6, 1991, for a 38.5% permanent partial disability to the body as a whole.

Claimant is awarded 131.43 weeks of temporary total disability compensation at the maximum compensation rate of $278 per week in the sum of $36,537.54 followed thereafter by 283.57 weeks permanent partial disability compensation at the rate of $145.41 per week in the sum of $41,233.91 for a total award of $77,771.45.

As of February 20, 1998, there would be due and owing to claimant temporary total disability compensation for 131.43 weeks at the rate of $278 per week in the sum of $36,537.54 followed thereafter by 231.86 weeks of permanent partial disability compensation at the rate of $145.41 in the amount of $33,714.76 making a total due and owing of $70,252.30 all of which is ordered paid in one lump sum minus amounts previously paid. Thereafter claimant is awarded 51.71 weeks permanent partial disability compensation at the rate of $145.41 in the sum of $7,519.15 until fully paid or until further order of the Director.

Future medical benefits may be awarded upon proper application to and approval by the Director.

Unauthorized medical expense up to $350 is ordered paid to or on behalf of the claimant upon presentation of an itemized statement verifying same.

Claimant's contract for attorney fees cannot be approved as attorney liens from Chris R. Davis of Phelps - Chartered and Mike Allen of Smith, Greenleaf and Brooks were filed with the Workers Compensation Director but no resolution of these liens was reached

by the Administrative Law Judge. In addition, insufficient information exists in the record upon which the Appeals Board can base a decision.

The fees and expenses of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Underwood & Shane	
Transcript of Regular Hearing	$196.00
Susan Maier	
Transcript of Preliminary Hearing	$100.00
Alexander Reporting Co.	
Deposition of Pedro Murati, M.D.	$113.75
Deposition of James Molski	$131.55
William F. Morrissey	
Special Administrative Law Judge	$150.00

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Kerry McQueen, Liberal, KS
Kenneth S. Johnson, Administrative Law Judge
Philip S. Harness, Director